Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CHARLENE DEMUS,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do persons employed with the State of California, and the Counties within the State of California, have the same right as other employees to seek judicial relief for employment discrimination under 42 USC §1981?

2. Must a plaintiff employee *prove* that the defendant employer's articulated reason for its employment action is pretextual in order to successfully oppose the employer's motion for summary judgment?

3. Was the failure, of both the district court and the court of appeals, to consider one of Petitioner's duly presented claims of discrimination – i.e., the claim of discrimination regarding Petitioner's suspension – a failure that calls for an exercise of the Supreme Court's supervisory power?

LIST OF PARTIES

The caption contains the names of all the parties to this action. Petitioner Charlene Demus is an individual. Respondent County of San Diego is a county within, and a political subdivision of, the State of California.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. See Memorandum decision (Appendix 1a). The order of the United States District Court for the Southern District of California, granting Respondent's motion for summary judgment, is also unreported. See Order Granting Summary Judgment (Appendix 4a).

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was entered on November 19, 2004. See Memorandum decision (Appendix 1a).

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

(a) 42 USC §1981, and

(b) 42 USC §2000e-2(a)(1).

42 USC §1981 provides:

> **"(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and

proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"**(b) 'Make and enforce contracts' defined**

For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"**(c) Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

42 USC §2000e-2(a)(1) provides:

"**(a) Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;"

STATEMENT OF THE CASE

Charlene Demus ("Petitioner") is African-American. She is employed with Respondent San Diego County in Respondent's Health & Human Services Agency ("HHSA"), and she has been so employed since 1989. From 1995 to November, 2001, Petitioner worked in adoption services and was assigned to HHSA's Tayari Adoptions Unit ("Tayari"). A majority of the children [potential adoptees] assigned to Tayari were African-American, and a majority of the employees assigned to Tayari were African-American. Tayari was Respondent's adoption unit that focused on adoptions for African-American children.

On May 21, 1999, Petitioner was promoted from the position of Protective Services Worker ("PSW") I to PSW II. Under Respondent's civil service rules Petitioner was required to serve a one-year probationary period in the PSW II position. The duties and responsibilities of the PSW I and PSW II positions were the same; and Petitioner performed the same employment functions and duties as a PSW II that she performed as a PSW I, including but not limited to the caseload and complexity of cases she handled.

The supervisor of the Tayari Adoption Unit, and Petitioner's immediate supervisor, was Margaret Katungi ("Katungi). Katungi is also African-American. On August 25, 1999, Petitioner received a performance appraisal in which Katungi rated her as meeting expectations in each of her performance duties and meeting expectations overall. Respondent's Adoption Programs Manager Sharon Harrington ("Harrington"), who is Caucasian, approved the appraisal. Petitioner received a mid-probationary performance appraisal on November 19, 1999, in which Katungi again rated her as

meeting expectations, and that appraisal, too, was approved by Harrington.

In January, 2000, in response to an allegation of sexual molestation, Petitioner visited a home in which two foster children had been placed – a boy who was 2 ½ years old and a girl who was 6 ½ years old. Respondent's Civil Service Commission later found, and described, Petitioner's conduct regarding that visit as follows.

> With the assistance of the foster parent, the children were disrobed. Petitioner examined the children for discoloration, marks, or bruising. She found no discoloration, marks, or bruising evidencing neglect or abuse.
>
> There was no indication of any embarrassment, trauma, or other negative effects on the children as a result of the examination. The foster parent was apparently satisfied with Petitioner's conduct, and Respondent received no complaints about Petitioner's examination. The children remained assigned to Petitioner's care. There was no evidence that the children were either harmed or upset by Petitioner's examination, and the examination did serve the important purpose of monitoring the children's welfare. The foster parent liked Petitioner and was satisfied with her conduct.
>
> Petitioner made the children feel comfortable by providing privacy and the presence of an adult [the foster parent] trusted by the children. Additionally, Petitioner protected Respondent from potential claims of liability by providing an adult witness, promptly and fully documenting her examination of the

children, and keeping her immediate supervisor informed regarding the situation.

Notwithstanding the commendable nature of Petitioner's examination of the children, her examination did not strictly comply with one of Respondent's policies; to wit, the policy stating that, when examining the body of a child, the child should not be disrobed totally ("Disrobe Policy"). Petitioner was unaware of the Disrobe Policy at the time in question.

Even though Petitioner had been unaware of, and violated, the Disrobe Policy, Katungi definitely believed that she should have passed her probationary period as a PSW II. However, Harrington would not permit Katungi to express this belief, and rate Petitioner accordingly, in a final probationary appraisal. Harrington wanted Petitioner to fail probation; and on May 31, 2000, Petitioner was notified that she was demoted back to PSW I, effective June 1, 2000, allegedly because she was incompetent to fulfill the duties of the PSW II position. Petitioner never received a final probationary appraisal. Upon resuming her employment as a PSW I Petitioner continued to perform the same duties she performed as a PSW II, and she was again rated as meeting all expectations in her performance appraisals.

Also on May 31, 2000, Respondent notified Petitioner of the intent to terminate her employment because of (i) her unawareness, and violation, of the Disrobe Policy, and (ii) her alleged falsification in the Critical Incident Report ("CIR") she prepared regarding her examination of the children. However, after a hearing conducted in June, 2000, the hearing officer – an HHSA Assistant Deputy Director – determined that Petitioner did not falsify the CIR, and reduced her discipline from termination to a five-day

suspension without pay. Petitioner served the five-day suspension.

Petitioner appealed the suspension to Respondent's Civil Service Commission, and a hearing was held. Following the hearing, in findings and conclusions issued in November, 2000, the Commission found that Petitioner conducted her examination of the children in the commendable manner cited herein above, but also found that she failed to familiarize herself with the Disrobe Policy, and "on that limited issue [Petitioner] was not competent." The Commission also found that the five-day suspension was "unduly harsh," and reduced the already-served suspension to a letter of reprimand.

Petitioner filed a charge of employment discrimination against Respondent with the Equal Employment Opportunity Commission ("EEOC"). After duly exhausting the EEOC administrative process, on November 27, 2001, Petitioner filed a Complaint For Employment Discrimination against Respondent in the district court. The jurisdiction of the district court was invoked pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 USC §2000e-5) and 28 USC § 1331. In the complaint Petitioner alleged that she suffered race discrimination, in violation of 42 USC § 1981 and Title VII, when (i) she was issued, and served, the five-day suspension, and (ii) she was demoted back to PSW I. On December 2, 2002, Respondent moved the court for a summary judgment in its favor. Petitioner opposed the motion, citing the merits of, and genuine issues of fact regarding, both the suspension and demotion discrimination claims. On February 10, 2003, the district court granted Respondent's motion in an order that, among other things, (a) failed to address the suspension claim at all, (b) made credibility determinations regarding certain declaration testimony, and (c) drew significant inferences in favor of

Respondent – the moving party – rather than Petitioner. See Order Granting Summary Judgment (Appendix 9-22a). A judgment was entered on that order the same day. See Judgment (Appendix 23a).

Petitioner filed a notice of appeal to the Ninth Circuit Court of Appeals on February 26, 2003. In a decision filed on November 19, 2004, the Ninth Circuit panel affirmed the district court's grant of summary judgment, concluding that,

> (a) "We affirm the district court's grant of summary judgment on [Petitioner's] §1981 claim, because her employment is governed by statute, rather than contract" (Memorandum decision [Appendix 2a]).
>
> (b) Petitioner "has not *shown* that the county's articulated nondiscriminatory reasons for its adverse employment actions were pretextual. To survive a motion for summary judgment, [Petitioner] had to *rebut* the county's proffered justifications with direct or indirect evidence of pretext" (Memorandum decision [Appendix 2a]) (emphasis added);
>
> (c) Respondent's "explanation for its demotion and disciplinary action, validated by the civil service commission's finding that [Petitioner] was incompetent in examining two foster children, counters the presumption of discrimination" (Memorandum decision [Appendix 2a]).

REASONS FOR ALLOWANCE OF THE WRIT

A. Review Is Warranted Because The Ninth Circuit Has Decided An Important Federal Question – i.e., Whether Persons Employed With The State Of California And Counties Within That State May Seek Relief For Employment Discrimination Under 42 USC § 1981 – In A Way That Conflicts With Relevant Decisions Of This Court.

Prior to 1991, 42 USC §1981 consisted of one paragraph that, among other things, prohibited discrimination against non-White persons in the making and enforcement of contracts. As a part of the Civil Rights Act of 1991 §1981 was amended with the addition of two paragraphs – (b) and (c). Paragraph (b) defines the phrase "make and enforce contracts," contained in the original paragraph [now designated paragraph (a)], to include, among other things, "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." See 42 USC §1981(b) set forth herein above. Paragraph (c) confirms that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and *impairment under color of State law*" (emphasis added). See 42 USC §1981(c) set forth herein above.

Citing the 1977 California Supreme Court decision in *Miller v. State of California*, 18 Cal.3d 808 (1977), the court of appeals in the present case opined that Petitioner's "employment [with San Diego County] is governed by statute, rather than contract," and based on that opinion the court held that Petitioner could not pursue a claim of employment discrimination under 42 USC §1981. See also *Judie v. Hamilton*, 872 F.2d 919 (9 Cir. 1989) (where the Ninth Circuit denied persons employed with the State of Washington

the protection of § 1981 because that employment is governed by Washington State statutes). This conclusion, which, with respect to rights protected under §1981, disenfranchises thousands of State and County employees in California, is based on a misunderstanding of the *Miller* decision, and conflicts with relevant decisions of this Court.

First, *Miller* is cited out of context. The plaintiff in that case began his employment with the State of California at a time when the statutorily mandated retirement age was 70. However, again by statute, the mandatory retirement age was subsequently changed to 67. Miller claimed that, based on the fact that 70 was the retirement age when he began his employment, he had a vested contractual right to continue his State employment until he reached 70. It was in response to this claim that the California Supreme Court said, "it is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law" (18 Cal.3d 808, 813). However, the fact that public employment in California is held under "terms and conditions" makes such employment a "contractual relationship" within the broad scope of §1981(b), even though the "terms and conditions" are fixed by law rather than a separate contractual agreement.

Second, even if the *Miller* decision did stand for the proposition that public employment in California is not based on a contractual relationship, it could not deny a public employee rights provided by Congress in §1981. Such a circumstance would certainly *wrongfully* elevate the California Supreme Court's characterization of public employment over Congress' determination to protect California's public employees from race discrimination.

Again, the rights protected under §1981 include the right to "the full and equal benefit of all laws" (§ 1981 (a)), and are protected against impairment by nongovernmental discrimination *and impairment under color of State law*" (§1981(c) (emphasis added). As this Court stated in *Felder v. Casey*, 108 S.Ct. 2302 (1988), "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal power, must yield'" (at 2307).

B. Review Is Warranted Because The Ninth Circuit Has Decided An Important Federal Question – i.e., The Burden Borne By A Plaintiff, Who Has Asserted A Disparate Treatment Employment Discrimination Claim, In Opposing The Employer's Summary Judgment Motion – That Has Not Been, But Should Be, Settled By This Court.

In *Raytheon v. Hernandez*, 124 S.Ct. 513 (2003), this Court recently noted the "burden-shifting scheme" for disparate treatment employment discrimination cases, first set forth in the Court's decision in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973). See *Raytheon*, at 518, n. 3. Under that "burden-shifting scheme," the plaintiff has the initial burden of establishing a *prima facie* case of discrimination. If the plaintiff does so, the burden shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the defendant meets this burden, the presumption of intentional discrimination created in the *prima facie* case disappears, but the plaintiff can still prove his/her claim of disparate treatment discrimination by "offering evidence demonstrating that the employer's explanation is pretexual" (*Id*).

In *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981), this Court addressed and clarified the burden borne by the defendant-employer to articulate a legitimate reason for its action. This Court said the employer's burden is one of production, not proof. In *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), the Court addressed and clarified the ultimate burden borne by the plaintiff to prove discrimination by proving that the defendant-employer's articulated explanation is pretextual. The Court said proof of pretext requires both proof that the articulated explanation was not the real reason for the employment action, *and* proof that the real reason was prohibited discrimination.

However, this Court has never addressed and clarified the burden borne by the plaintiff in opposing the defendant-employer's motion for summary judgment after said defendant has articulated a legitimate, nondiscriminatory reason for its action. We respectfully submit that such clarification is needed because, (1) the burden in opposing a summary judgment motion is being confused with the ultimate burden of proving discrimination, and (2) in the absence of clarification, many judges have acted more like juries than judges in considering summary judgment motions. See *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2111 (2000) ("[T]he Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's."). With due deference to the Ninth Circuit panel in the present case, that is exactly what happened in this case. The panel affirmed the district court's summary judgment order because, in the panel's opinion, Petitioner failed to *prove* that Respondent's articulated reason for demoting and disciplining her was pretextual. As the panel stated,

> "[Petitioner] has not *shown* that the county's articulated nondiscriminatory reasons for its adverse employment actions were pretextual. To survive a motion for summary judgment [Petitioner] had to *rebut* the county's proffered justifications with either direct or indirect evidence of pretext" (Memorandum decision [Appendix 2a]) (emphasis added).

However, the burden borne by the plaintiff in opposing a summary judgment motion is certainly not the same as the ultimate burden of proving the discrimination claim itself; i.e., proof of pretext. The burden in opposing a summary judgment motion is a lesser burden, and akin to that suggested – but not held – by this Court in *Raytheon*: "Thus, the only relevant question before the Court of Appeals, after [the employer] presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent's [protected] status . . . despite petitioner's proffered explanation" (124 S.Ct. at 520).

In *Trans World Airlines, Inc. v. Thurston*, 105 S.Ct. 613 (1985), this Court stated that "[t]he shifting burdens of proof set forth in McDonnell Douglas are designed to *assure* that the 'plaintiff [has] his day in court despite the unavailability of direct evidence'" (at 622) (emphasis added). Unless the plaintiff's burden in opposing an employer's summary judgment motion is clarified by this Court, and clearly distinguished from the ultimate burden of proving discrimination, that designed assurance will certainly vanish.

In the present case Petitioner offered substantial evidence from which a jury could conclude that Respondent's stated

reason for her demotion and discipline – her alleged incompetence to perform the duties of the PSW II position – was neither an accurate, nor the actual, reason for the demotion and discipline.

First, the PSW II duties are the same as the PSW I duties. Based on the record in this case, Petitioner could not be incompetent to perform the duties as a PSW II if she was competent to perform them as a PSW I.

Second, Respondent was unable to identify any employee, other than Petitioner, who was demoted back from PSW II to PSW I during probation.

Third, Grace Blaszkowski, a person who also worked at Tayari, gave deposition testimony regarding racial bias and prejudice harbored by Respondent's Adoption Programs Manager Harrington.

Fourth, Petitioner's immediate supervisor definitely believed that she should have passed her PSW II probation. However, Harrington prevented the supervisor from giving Petitioner a final probationary performance appraisal expressing this belief.

Fifth, Respondent admitted that an employee's mistake in applying policy did not absolutely mean that the employee could not pass probation. However, Respondent presented no explanation why Petitioner's mistake constituted an absolute bar to her passing probation.

Sixth, Respondent admitted that there is some case-by-case flexibility in the application of the Disrobe Policy Petitioner failed to strictly follow. However, Respondent presented no explanation why that flexibility was not extended

to Petitioner; especially in light of the commendable manner in which Petitioner conducted the examinations in question.

Seventh, the Civil Service Commission found that Petitioner was incompetent on the "limited issue" of failure to familiarize herself with the Disrobe Policy, not the manner in which she actually examined the children.

C. Review Is Warranted Because The Ninth Circuit Has Sanctioned Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

In her district court complaint, her memorandum in opposition to Respondent's summary judgment motion, and her Ninth Circuit appeal briefs, Petitioner expressly alleged that she was discriminated against when she was demoted *and when she was suspended*. Both the district court judge and Ninth Circuit panel failed or refused to address the suspension claim. The Ninth Circuit's failure or refusal was exacerbated by its conclusion that "[t]he county's explanation for its demotion *and disciplinary action* [was] validated by the civil service commission's finding that [Petitioner] was incompetent in examining two foster children" (Memorandum decision [Appendix 2a]) (emphasis added). Petitioner's suspension clearly was not "validated" by the Civil Service Commission because the Commission expressly found the suspension "unduly harsh," and reduced that discipline to a written reprimand. Also, again, the "limited issue" on which the Commission found that Petitioner was incompetent was her failure to familiarize herself with the Disrobe Policy, not her examination of the children.

We respectfully submit that the unexplained and unjustified failure or refusal of the district court and Ninth Circuit to consider one of Petitioner's duly presented, independent, claims of discrimination constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Supreme Court grant this writ of certiorari.

DATED:

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55382
[Filed: November 19, 2004]
[Argued and Submitted: November 4, 2004]

CHARLENE DEMUS,
Plaintiff - Appellant,

v.

COUNTY OF SAN DIEGO,
Defendant - Appellee.

JUDGES: BEFORE: GOODWIN, FISHER and TALLMAN, Circuit Judges.

OPINION: MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Charlene Demus appeals the district court's grant of summary judgment in favor of the County of San Diego on her claims of racial discrimination under 42 U.S.C. § 2000e-5 ("Title VII"); 42 U.S.C. § 1981; and California's Fair

Employment and Housing Act (FEHA), Cal. Gov't Code § 12940. We affirm.

The district court properly granted summary judgment in favor of the county on Demus' Title VII claim. Even assuming Demus established a *prima facie* case of discrimination, *see Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998), she has not shown that the county's articulated nondiscriminatory reasons for its adverse employment actions were pretextual. To survive a motion for summary judgment, Demus had to rebut the county's proffered justifications with either direct or indirect evidence of pretext. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 641-42 (9th Cir. 2004), *amending Vasquez v. County of Los Angeles*, 307 F.3d 884 (9th Cir. 2003).

The county's explanation for its demotion and disciplinary action, validated by the civil service commission's finding that Demus was incompetent in examining two foster children, counters the presumption of discrimination. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994). Further, the county has offered a legitimate reason -- reorganization of its adoptions program -- for Demus' transfer to another unit. Demus has failed to counter the county's asserted justifications with evidence of pretext.

We affirm the district court's grant of summary judgment on Demus' § 1981 claim, because her employment is governed by statute, rather than contract. *Miller v. State of California*, 18 Cal.3d 808, 813, 135 Cal. Rptr. 386, 557 P.2d 970 (Cal. 1977).

The district court did not abuse its discretion in denying Demus leave to amend the scheduling order, because she

failed to demonstrate good cause. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992).

Finally, Demus' FEHA claim also cannot survive summary judgment, because she has failed to rebut the county's nondiscriminatory reasons for its adverse employment actions against her. *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (Cal. 2000) (applying federal framework to state discrimination claim on summary judgment).

The judgment of the district court is **AFFIRMED.**

APPENDIX B

UNITES STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

Case No. 01-CV-2163 W (CGA)
[Filed February 10, 2003]

Charlene Demus,	)
Plaintiff,	)
	)
v.	)
	)
County of San Diego,	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On December 2, 2002 defendant County of San Diego ("Defendant") moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Charlene Demus ("Plaintiff") opposes. All parties are represented by counsel. The Court decides the matter on the papers submitted and without oral argument pursuant to Civil local rule 7.1(d.1).

I. Background

Plaintiff is an African-American woman employed by Defendant's Health and Human Services Agency ("Agency") since 1989. For the past six years, Plaintiff has been employed at Defendant's Tayari Adoptions facility ("Tayari"). The majority of Tayari's employees and children are African-American.

In May 1999 Defendant promoted Plaintiff from Protective Services Worker ("PSW") I to PSW II. Under Civil Service Rules, Plaintiff was required to serve a one year PSW II probationary period. (*Mem. Of P. & A. Support of Defendant's Motion for Summary Judgment* ("*Summ. J. Mot.*") at 1). Plaintiff received satisfactory performance evaluations as a PSW I and during the first half of Plaintiff's PSW II probationary period.

In January 2000 Plaintiff investigated a child sexual molestation allegation in a private residence. As part of Plaintiff's investigation, Plaintiff examined the children completely disrobed, including privates. (*Defendant's Lodgment* ("*Lodgment*") ex. 5.) Plaintiff described this examination in the Critical Incident Report ("CIR") Plaintiff prepared following the investigation.

Upon reviewing Plaintiff's CIR, Sharon Harrington ("Harrington"), the Caucasian Adoptions Program Manager, became concerned that Plaintiff's examination violated Agency policy. Harrington expressed her concerns to Margaret Katungi ("Katungi"), Plaintiff's African-American supervisor, who in turn discussed the matter with Plaintiff. Katungi then sent an email to Harrington stating that "Demus would like to rewrite" the CIR. (*Summ. J. Mot.* At 1). Harrington authorized the rewrite.

Plaintiff redrafted the CIR omitting any reference to inappropriate examination of children's private areas. In light of Katungi's email and the revised CIR, Harrington later became concerned that Plaintiff has revised the CIR to conceal possible Agency policy violations. For this reason, Harrington informed Agency superiors of the situation. The Agency's Internal Security launched an investigation and concluded that (1) Plaintiff had revised the CIR to conceal potential policy violations, (2) Plaintiff's examination violated Agency policy, and (3) Plaintiff was unfamiliar with acceptable Agency policy regarding child examinations.

In May 2000, after reviewing the Internal Security investigations results and consulting with Harrington and others, Caucasian Agency Deputy director/General manager Yvonne Campbell ("Campbell") decided that Plaintiff had failed probation. Though normally an employee who does not pass probation returns to his or her former position, Campbell determined that Plaintiff's dishonesty warranted more definitive action. Therefore, Campbell charged Plaintiff with dishonesty and proposed Plaintiff's termination.

In response to termination notification, Plaintiff participated in a Skelly conference. The Caucasian Skelly officer examined each allegation against Plaintiff. Notably, Plaintiff explained that she had not requested to rewrite the CIR. Katungi had, in fact, instructed Plaintiff to do so. (*Summ. J. Mot.* At 3). Based on these findings, the Skelly officer concluded that Plaintiff has not been dishonest. As a result, Campbell reduced Plaintiff's termination to a five-day suspension, deleted the dishonesty charge

Plaintiff appealed her suspension to the Civil Service Commission. In a decision dated November 1, 2000 the Commission concluded that Plaintiff's unfamiliarity with

Agency policy constituted incompetence and that the child examination did, in fact, violate Agency policy. However, the Commission reduced Plaintiff's suspension to a reprimand. Plaintiff's demotion was not addressed because the issue was not appealable.

On December 4, 2000 Plaintiff filed race discrimination charges with the California Department of Fair Employment/Housing and Equal Employment Opportunity Commission ("DFEH/EEOC"). On August 30, 2001 the EEOC dismissed, finding no evidence to conclude discrimination had occurred. The EEOC then issued a Notice of Right to Sue under Title VII.

In October 2001 the Agency informed Tayari Children's Workers that the Adoptions Program was reorganizing. The three Children's Workers were given options to either continue as Children's Workers at another location or remain at Tayari as Applicant Workers. Plaintiff elected to continue as a Children's Worker and transferred to National City, near her own children's school.

On November 27, 2001 Plaintiff commenced this employment discrimination action. Plaintiff alleges (1) race discrimination in violation of Title VII and 42 U.S.C. § 1981, (2) retaliation[1] in violation of Title VII, and (3) discrimination and retaliation in violation of California's Fair Employment and Housing Act ("FEHA") (Cal. Gov't Code § 12940). Defendant now seeks summary judgment on all claims.

---

[1] Plaintiff actually uses the term "reprisal" in her complaint. The Court notes that under Title VII case law, "reprisal" and "retaliation" are interchangeably used.

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P.56©)); *Celotex Corp. V. Catreet*, 477 U.S. 317, 322 (1986); *see also Klamath Water users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000) (recognizing that where material facts are undisputed, the court only decides the application of relevant law). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the non-moving party's case or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Id.* At 322-23.

However, once the moving party meets this initial burden, the non-moving party cannot defeat summary judgment by merely demonstrating "that there is some metaphysical doubt as to the material facts." *See Matsushita Elec. Indus. Co., ltd. v. Zenith radio Corp.*,475 U.S. 574, 586 (1986); *Triton Energy Corp. V. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (*citing Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient."). Rather, the non-moving party must "go beyond the pleadings and by her own

affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial,'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P.56(e)).

When making this determination, all inferences drawn form the underlying facts must be viewed in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

Finally, "the district court may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco unified School Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

III. ANALYSIS

A. RACE DISCRIMINATION CLAIMS

Plaintiff first contends that her demotion, reprimand and reassignment were based on impermissible race discrimination in violation of Title VII. Title VII makes it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of his employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). A Plaintiff may show a violation of Title VII "by proving disparate treatment or disparate impact, or by proving the existence of a hostile work environment." See *Sischo-*

Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991).

In order to survive a motion for summary judgment, a Title VII plaintiff must first make out a prima facie case of race discrimination. *See Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993). To establish a prima facie case under Title VII, a plaintiff must show; (1) she is a member of a protected minority; (2) she was performing his job in a satisfactory manner; (3) she suffered an adverse employment action; and (4) she was replaced by an individual outside the protected class with equal or inferior qualifications, that similarly-situated employees outside the protected class were treated more favorable or at least that her termination occurred under circumstances giving rise to an inference of race or gender discriminations. *See Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1988) (*citing McDonnell Douglas Corp. V. Green*, 411 U.S. 792, 802 (1973)). Then, in order to defeat summary judgment, the plaintiff must advance evidence which suggests that the employer's proffered reason for the employment decision was not its true reason, but was a pretext for discrimination. *Burdine*, 450 U.S. at 253.

1. PLAINTIFF CANNOT SHOW THAT SHE WAS PERFORMING HER JOB SATISFACTORILY[2]

The first element Plaintiff must prove to make out a prima facie case is that she was performing her job satisfactorily at the time Defendant undertook the alleged discriminatory action. Neither party disputes that plaintiff received positive performance reviews as a PSW I, both before and after her demotion, and at the midterm of her PSW II probationary period. In fact, it appears Plaintiff was not subject to any disciplinary action until the January 2000 examination. At that time, the County Civil Service Commission determined the examination violated Agency policy. (*Commission Findings, Conclusions and Recommendations, Defendant's Lodgment* ("*Comm'n Findings*"), Ex. 17, at 17-5). Stated differently, by conducting an unauthorized examination, Plaintiff demonstrated her lack of familiarity with Agency policy. Given that Plaintiff's position required knowledge of Agency policy and that Plaintiff certified an acknowledgment that she would know and follow Agency policy, this represents unacceptable job performance.[3] (*See Comm'n Findings* at 17-12).

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[2] It is undisputed that Plaintiff is a racially protected class member (African-American). Accordingly, the Court need not examine the first *McDonnell Douglas* Factor which is clearly satisfied here.

[3] Plaintiff admitted that she was not familiar with the relevant Agency policy, but that she was aware that failure to comply with Agency policy was grounds for disciplinary action. (*See Comm'n Findings* at 17-12).

Based on Plaintiff's failure to familiarize herself with the Agency's policy, the Agency determined Plaintiff to be incompetent in her job. (*See Comm'n Findings* at 17-16). Incompetence is one of the grounds for which a probationary employee may be removed from her position. (*See Lodgment* ex. 15 (*citing* Civ. Service Rule 7.2 (a))). In this case, Defendant properly notes that incompetence was, in fact, the reason Plaintiff was demoted from PSW II to PSW I. Plaintiff presents no admissible evidence upon which a jury could reasonable rely to find otherwise.

2. PLAINTIFF DID NOT SUFFER AN ADVERSE EMPLOYMENT ACTION

Plaintiff must next show that she suffered an adverse employment action. In this case, Plaintiff cites examples of adverse employment actions upheld by the Ninth Circuit, but does not explain how the precedent might apply here. For example, Plaintiff states that "lateral transfers, unfavorable job references, and changes in work schedules" can be considered adverse employment actions. (*Opp'n* at 23). While the Court acknowledges that demotion from PSW II to PSW I was clearly an adverse employment action, it is unclear whether discrimination motivated the demotion in any way. Plaintiff's primary discrimination allegation relating to this incident is Harrington's question to Katungi "what do you got on Chalene?" (*See Opp'n* at 9). Katungi admits in her deposition, however, that she did not understand what Harrington meant by this and Harrington did not explain. The Court finds such a vague reference insufficient to raise a genuine inference of discrimination relating to an adverse job action. *Vasquez v. County of Los Angeles*, 307 F.3d 884, 889 (9th Cir. 2002) (finding that a plaintiff must offer evidence

that "give[s] rise to an inference of unlawful discrimination" to make out a prima facie case).

Plaintiff's facility transfer likewise did not constitute an adverse employment action. At the new location, Plaintiff maintained the same job title, duties, and pay rate. Furthermore, Plaintiff was not the only one transferred. All of the Children's Workers were given the choice to either transfer and continue as Children's Workers or stay at the Tayari facility as Applicant Workers. Plaintiff unilaterally opted to relocate and continue as a Children's Worker. Additionally, the National City branch she transferred to was near her children's school.

While Plaintiff contends that the action was adverse because she did not want to leave Tayari, this argument lacks merit. The reasons proffered by Plaintiff's deposition testimony all represent Plaintiff's subjective feelings. However, the Court may only evaluate the adversity of an employment action objectively. *Vasquez*, 307 F.3d at 891. Therefore, Plaintiff's personal feelings about leaving, standing alone, are insufficient to create an inference of adverse employment action.

Weighing the evidence in the light most favorable to Plaintiff, as the Court is bound to do, the Court nonetheless finds that Plaintiff has not pointed to any probative evidence that she suffered an adverse employment action.

3. PLAINTIFF WAS NOT TREATED LESS FAVORABLE THAN SIMILARLY-SITUATED EMPLOYEES OUTSIDE THE PROTECTED CLASS

In evaluating the last *McDonnell Doulgas* element, the Court initially notes that Plaintiff was never terminated. As such, the Court evaluates only whether Plaintiff was replaced by or treated less favorable than a non-African-American employee. First, because neither party claims that Plaintiff was replaced by someone else as a PSW II, this appears to be a nonissue. Likewise, Plaintiff was not replaced by another Children's Worker during the reorganization.[4] The incoming workers at Tayari had completely different job descriptions and roles.

Second, there is no evidence that similarly-situated non-African-American employees were treated more favorably than Plaintiff. Every Tayari Children's Workers was African-American and all were provided the same choices as Plaintiff. Furthermore, a document written by Grace Blaszkowski, upon which Plaintiff heavily relies for proof of discrimination, specifically describes how Harrington unfairly *favors* a particular *African-American* worker. (*Tooks Decl. Ex.D*). Though this employee is not a Children's Worker, Harrington's favoritism towards her strongly refutes race discrimination inferences. Therefore, the Court holds that no jury could reasonable find that Defendant replaced Plaintiff or treated her less favorable than a similarly-situated employee outside the protected class. *See Foss v. Thompson*, 242 F.3d

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[4] Furthermore, as discussed previously, Plaintiff could have remained at Tayari as an Applicant Worker, but chose to leave.

1131, 1134 (9th Cir. 2001) (Summary judgment properly granted when plaintiff had no evidence that persons outside his protected class were treated more favorably).

4. DEFENDANT HAS ARTICULATED LEGITIMATE AND NONDISCRIMINATORY REASONS FOR PLAINTIFF'S ALLEGED DISCRIMINATORY CONDUCT

Even assuming Plaintiff could establish a prima facie case (which Plaintiff has not), Defendant has articulated legitimate and nondiscriminatory reasons explaining Plaintiff's demotion reprimand and transfer. As illustrated above, Defendant sufficiently rebuts any discriminatory presumptions relating to Plaintiff's demotion and reprimand with evidence demonstrating that Plaintiff was not satisfactorily performing her job. Specifically, Plaintiff's demotion and transfer directly resulted from the unauthorized examination Plaintiff performed on two children. Defendant took immediate action to investigate Plaintiff's inappropriate child examination and followed through with timely disciplinary action. Defendant has therefore articulated a direct causal nexus between Plaintiff's misconduct and Defendant's disciplinary measures. Plaintiff's demotion and reprimand directly resulted from her admitted failure to follow Agency policy.

Defendant has likewise provided ample justification for Plaintiff's transfer. The agency reorganization required all Children's Workers to transfer out of Tayari, not just African-Americans. Plaintiff contends that because all Tayari Children's Workers were African-American, Defendant's removal of these employees was discriminatory. This argument fails for two reasons. First, the Children's Workers

were not forced to leave Tayari - they were given the option to stay as Applicant Workers. Second, when the Agency eventually decided to bring Children's Workers back to Tayari, it brought in both African-American and non-African-American employees (*Opp'n* at 22). Logically, has the Agency intended to racially discriminate, it would not have returned African-American workers to the facility. Ultimately, these actions justified employment category reorganization, not race discrimination.

For the foregoing reasons, the Court finds that Defendant has established legitimate, non-discriminatory reasons for the disputed employment actions. Therefore, the burden now shifts back to Plaintiff to prove Defendant's "proffered justification is merely a pretext for discriminations." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

5. PLAINTIFF DOES NOT PROVIDE SPECIFIC PROOF OF PRETEXT

In order to overcome Defendant's summary judgment motion, Plaintiff must provide specific proof of pretext. Where, as here, an employer articulates a legitimate and nondiscriminatory reason for the personnel decision taken, the presumption of discrimination "simply drops out of the picture," *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and the burden shifts back to Plaintiff to show that Defendant intentionally discriminated against her based on race. *See Nidds v. Schindler Elevator Corp.*, 113 F2d 912, 918 (9th Cir. 1996) That is, Plaintiff must establish that the reason proffered by the employer for the action taken is actually a pretext for discrimination. *See Burdine*, 450 U.S. at 252-53; *Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990).

The Ninth Circuit has held that a plaintiff cannot create a genuine issue of pretext to survive a motion for summary judgment by relying solely on unsupported speculations and allegations of discriminatory intent. *See Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989) (a bald assertion that a genuine issue of material fact exists does not preclude summary judgment). Rather, a plaintiff must produce "specific, substantial evidence of pretext." *See Little v. Windermere Relocation Inc.*, 265 F.3d 903, 913 (9th Cir. 2001) (Citing *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996)); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994); *Mills v. Health Care serv. Corp.*, 171 F.3d 450, 458 (7th Cir. 1999) (to avoid summary judgment, a plaintiff must produce evidence from which a rational trier of fact could infer that the defendant lied about its proffered reasons for failing to promote her or that the reasons had no basis in fact).

In this case, Plaintiff fails to meet her burden for several reasons. First, the pretext "evidence" Plaintiff most strongly relies on is Harrington's "unexplained desire to see Plaintiff fail probation." (*Opp'n* at 18). However, the only factual support for this statement rests with Harrington's single question "what do you got on Charlene." (*Tooks Decl.* Ex. C-49).[5] Plaintiff's only other bases for the assertion that Harrington wanted Plaintiff to fail are Katungi's subjective interpretations. None of these assertions provide substantive support for Plaintiff's bald assertion of Harrington's desire to see Plaintiff fail. For this reason, Plaintiff's pretext claims

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[5] The Court notes that even this "evidence" is hearsay because Katungi is quoting Harrington in Katungi's deposition. No deposition of Harrington is included in the record before this Court.

based upon this token statement are simply unsupported speculations.

Likewise, Plaintiff's argument that Defendant was not authorized to demote Plaintiff because her performance was satisfactory lacks merit. Plaintiff's prior satisfactory performance reviews are irrelevant because none included the time frame in which the inappropriate examination occurred. During this period, Defendant found Plaintiff incompetent, which is a valid demotion justification.

Finally, Katungi's disagreement with Harrington and Campbell's subsequent demotion decision does not constitute sufficient proof of pretext. As Defendant points out, Katungi was not privy to the internal security investigation results upon which Harrington and Campbell based their decision. Moreover, Katungi's opinion may have been biased by the fact that her inaccurate email almost resulted in Plaintiff's termination. Therefore, Katungi's evaluation alone is insufficient evidence of pretext to overcome Defendant's proffered non-discriminatory reasons.

In sum, there is no evidence before this Court which suggests Plaintiff's demotion was based on pretext. No genuine issue of material fact remains for the trier of fact. *See McDonnell Douglas*, 411 U.S. at 807 (in the absence of pretextual evidence, the court must refuse to find employment discriminations). Accordingly, the Court finds that Plaintiff has failed to show that Defendant's alleged reasons for demoting, reprimanding and transferring Plaintiff were false or that the true reasons were discriminatory. Plaintiff's racial discrimination claim therefore fails as a matter of law.

B. RETALIATION CLAIMS

Plaintiff next argues that Plaintiff's reassignment to another location constituted reprisal. Specifically, Plaintiff claims Defendant sought retaliation for Plaintiff's EEOC race discrimination claim filing. Under Title VII, "[t]he employer is also prohibited 'from retaliating against an applicant for employment because the applicant has opposed any unlawful employment practice, or has made a charge, testified, assisted, or participated in an employment discrimination investigation or proceeding.'" *Lyons v. England*, 307 F.3d 1092, 1103 (9th Cir. 2002) (*citing Lam v. Univ. Of Hawaii*, 40 F.3d 1551, 1558-59 (9th Cir. 1994)). In order to prevail on an unlawful retaliation claim, a plaintiff must establish "(1) that he engaged in a protected activity, (2) that he suffered an adverse employment decision, and (3) that there was a causal link between plaintiff's activity and the employment decision." *Lyons*, 307 F.3d at 1118, (*quoting Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir. 1997)).

Plaintiff has failed to demonstrate retaliation. The Court acknowledges that filing a Complaint with the EEOC is certainly a protected activity. However, this Court has previously determined that Plaintiff did not suffer an adverse employment decision. Likewise, Plaintiff has failed to rebut Defendant's showing that it has a legitimate reason for transferring Plaintiff. Therefore, Plaintiff's reprisal claim under Title VII fails as a matter of law.

C. FEHA CLAIMS

Plaintiff next contends that Defendant violated FEHA based on her demotion, reprimand and alleged retaliatory reassignment. Under FEHA, it is unlawful for an employer to discriminate against an employee "in compensation or in

terms, conditions, or privileges of employment" based on race. Cal. Gov't Code § 12940. Unlike with Title VII claims, an employee claiming under FEHA is not required to first pursue all administrative avenues. However, where an employee fails to overturn an adverse finding from an administrative civil service proceeding, the finding is binding on FEHA claims. *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 76 (Cal.2000).

Here, the Commission did not expressly address Plaintiff's demotion. It did, however, find that Plaintiff was incompetent and violated Agency policy. Given that these were the stated reasons for Plaintiff's reprimand and demotion, this finding appears relevant to Plaintiff's FEHA claim. Stated differently, it would be very difficult for Plaintiff to prove discrimination in the terms of her employment when the Commission findings directly contradict her position. Incompetence constitutes sufficient grounds for discipline and probation failure and the Commission found Plaintiff incompetent. As such, Plaintiff is left with insufficient factual support for her FEHA discrimination claim. The Court finds that Plaintiff's failure to overturn the Commission findings mandates summary judgment in Defendant's favor.

Plaintiff's retaliatory reassignment FEHA claim is a separate matter. Plaintiff never instituted administrative proceedings addressing reassignment or retaliation claims. As such, failure to overturn administrative findings would not bar these claims. That being said, the Court finds no merit to these claims under FEHA. Plaintiff's compensation remained the same even after her transfer to National City. Likewise, Plaintiff retained her Children's Worker job status and all related benefits. The only change was Plaintiff's relocation, which was personal her choice. Furthermore, there is no basis for contending that being faced with the choice to relocate or

change job titles was retaliatory because *all* Children's Workers at Tayari were presented with this same choice. Therefore, the Court holds that no jury could reasonably find that Defendant retaliatorily transferred Plaintiff in violation of FEHA.[6]

D. 42 U.S.C. § 1981 CLAIM

Plaintiff's final allegation is that Plaintiff's reassignment constituted race discrimination in violation of 42 U.S.C. § 1981. Section 1981 protects the rights of all persons to make and enforce contracts. 42 U.S.C. § 1981. Under normal circumstances, this includes employment contracts. In California, however, it is well settled that public employment is governed by statute, not contract. *Miller v. State of California*, 18 Cal.2d 808, 813 (1977); *Hill v. City of Long Beach*, 40 Cal. Rptr.2d 125, 128 (Cal. Ct. App. 1995); *Kemmerer v. County of Fresno*, 246 Cal. Rptr. 609, 612 (Cal. Ct. App. 1988). As a state agency employee, Plaintiff would therefore be employed by statue.

Furthermore, Plaintiff's argument that the 1991 amendment to § 1981 changes Plaintiff's status constitutes an incorrect legal analysis. Section 1981 was amended to protect both private and public contract rights. However, this change does not affect individual sates' right to determine the character of its workers' employment. That is, if California opted to hire all public employees on a contractual bases, the § 1981 would protect these employees from racially

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[6] Because the Court finds that Plaintiff has provided insufficient evidence to support a retaliation claim, the Court declines to address whether or not Plaintiff exhausted her administrative remedies as to the reassignment and retaliation claims.

discriminatory employment decisions. California has instead chosen to define its workers' status by statue. Therefore, § 1981 is inapplicable and Plaintiff's claim fails as matter of law. *Judie v. Hamilton*, 872 F2d 919, 923 (9th Cir. 1989) (finding that a public employee employed by statute rather than contract cannot pursue a section 1981 claim).

IV. CONCLUSION AND ORDER

In light of the foregoing, the court **GRANTS** Defendant's motion for summary judgment on all claims. (Doc. No. 26). The Clerk of Court shall close the district court case file.

IT IS SO ORDERED.

DATE: February 7, 2003

/s/_____
Hon. Thomas J. Whelan
United States District Court
Southern District of California

CC: All Parties and Counsel of Record

APPENDIX C

UNITES STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

Case No. 01-CV-02163
[Filed February 10, 2003]

Charlene Demus,
Plaintiff,

v.

County of San Diego,
Defendant.

JUDGMENT IN A CIVIL CASE

__ JURY VERDICT. This actions came before the Court of trail by jury. The issues have been tried and the jury has rendered its verdict.

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT the defendant's motion for summary judgment is granted . . . .

2/10/03 — Date

W. Samuel Hamrick, Jr. — Clerk

Entered on 2/10/03

pre - Whelan
ref - Houston